SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 300

JACOB DVORKIN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

FRED B. RHODES,
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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Opinion Below.

The opinion of the Court of Claims forms a part of this record which has been prepared by the Court of Claims (R. 11-12).

Jurisdiction.

The final judgment by the Court of Claims was entered July 10, 1944 (R. 12). The jurisdiction of this Court is invoked under the rules adopted by the Supreme Court June 8, 1925.

Question Presented.

Whether the act of Congress of February 28, 1925 (43 Stat. 1061) providing a salary of sixty-five cents per hour for driver-mechanics in the Post Office Department can be evaded by any agreement entered into by an official of the Civil Service Commission and a representative of the Post Office Department, as set forth in the record.

Statement.

This case was decided in the Lower Court on a Demurrer and therefore all facts alleged in the Petition (R. 1-4), and the Amended Bill of Particulars (R. 4-11, must be admitted as true. The facts alleged in such Petition and Amended Bill of Particulars could not be denied as they are all a matter of official record.

In the year 1925, by reason of the depression which existed throughout the Country, an official of the Post Office Department having charge of this particular branch of the service conceived the idea that a large amount of money could be saved to the Government if the law was ignored which required the payment of sixty-five cents per hour to driver-mechanics, as it was believed that there would be no difficulty whatever in getting men to work as driver-mechanics for the salary of fifty-five cents per hour provided by Congress for the payment of garageman-drivers, a lower grade of work.

In an attempt to evade an act of Congress, passed more than ten years ago (R.5), which provided that men doing the work of a driver-mechanic should receive the sum of 65¢ per hour, the Civil Service Commission deliberately discontinued examining any persons to test their fitness for the work of a driver-mechanic. Under the fraudulent scheme connived by these two officials, it was arranged when there were vacancies in the work classed as driver-

mechanic that they would call upon the Commission for persons from the "garageman-driver" list, although they both knew that there was no vacancies for such work existing. Immediately upon arrival at the Post Office, before being permitted to do any work, the applicant was required to take a test as a driver-mechanic. If he failed in such test, he was rejected and sent away, with the information that there were no vacancies for which he was qualified. During the said ten years all vacancies were filled in this manner and there were no appointments made where the applicants were not able to qualify as a driver-mechanic. During the said ten years, and contrary to the postal regulations, no garageman-driver was given the pay of a driver-mechanic, notwithstanding the fact that more than 90% of the work done in this branch of the Post Office consisted of duties pertaining to the work of driver-mechanic.

The claimant bases his assertion as to the right to receive the wages prescribed for the duties of a driver-mechanic upon the following five series of actions (R. 6):

First, The Act of Congress of 1925 which prescribed that all employees performing the duties of a driver-mechanic should be paid 65 cents per hour.

Second, the published notices of the Post Office Department that a person entering this branch of service would receive the wages of a driver-mechanic when promoted to the grade requiring the performance of this class of work.

Third, the regulation of the Post Office Department of May 12, 1930, set forth in letter of August 11, 1941, to Charles I. Frankel (R. 6), which provided that driver-mechanics would be promoted immediately upon passing the prescribed noncompetitive examination. Claimant passed such examination before entering upon any duties whatsoever, but was not paid for the duties for which he

was qualified and to which he had been assigned by the Post Office Department.

Fourth, that the abolishment of the register by the Civil Service Commission was illegal and done to evade the requirement prescribed by Congress for the wages of driver-mechanics (R. 6).

Fifth, that at the time the claimant was put to work, the rules and regulations of the Post Office Department, which have the effect of law, provided that the Post Office Department should keep a record of the number of hours the employees worked in a dual capacity and that their titles should correspond to the positions to which the employees devoted a greater portion of their time. (Regulation 297 of the Rules and Regulations of the Post Office Department, 1925):

> "Employees' assignments shall, wherever possible, correspond with their roster title. Where the interest of the service requires that an employee perform several duties, his title designation shall correspond to the position to which he is required to devote the greater portion of his time."

The Court denied this claim in its opinion (R. 11-12), on the theory laid down in the case of *George L. Coleman* v. *United States*, 100 C. Cls. 41, which held that an employee was only entitled to receive the salary of the position to which he had been appointed. The Court then goes on to say that in the present case the "petition does not allege he was appointed a driver-mechanic, but he says his bill of particulars does." It is respectfully submitted that the *Coleman* case has no bearing whatever on the present case. In that case, Petitioner alleged specifically that he had been appointed garageman-driver but was endeavoring to secure the salary of a driver-mechanic, because he had been assigned to such work. In the Bill of Particulars

(R. 4-11) it is specifically alleged that Petitioner was appointed a driver-mechanic and alleges the steps taken by the Government to accomplish that assignment. It is respectfully submitted that the allegations contained in the Bill of Particulars are just as effective as those stated in the Petition itself.

In the case of *Glavey* v. *The United States*, 182 U. S. 595, which was a very similar case, appealed from the Court of Claims, this Court states the law to be as follows:

> "During the time the claimant was performing the duties of special inspector of foreign steam vessels, as aforesaid, he made no request or demand upon the Secretary of the Treasury or any other officer of the defendants, to be paid the salary prescribed by law for the incumbent of the office of special inspector of foreign steam vessels at said port, nor did he when he subscribed the oath as aforesaid; nor did he at any time thereafter while he held said office of local inspector of hulls of steam vessels, for which he was paid as aforesaid, make to the Secretary of the Treasury or to any other officer of the government any protest or objection whatever to the performance of the duties of special inspector of foreign steam vessels in connection with his appointment as local inspector of hulls of steam vessels at said port without additional compensation.
>
> "It remains to inquire whether, by reason of the statement in the Secretary's letter or communication of May 15th, 1891, that the appointment in question was 'without additional compensation' beyond that received by the appointee as local inspector of hulls of steam vessels, Glavey was estopped to demand the salary fixed by the Act of 1882 for special inspectors of foreign steam vessels.
>
> "There is no principle upon which an individual appointed or elected to an official position can be compelled to take less than the salary fixed by law. The acceptance and discharge of the duties of the office after

appointment is not a waiver of the statutory provision fixing the salary therefor, and does not establish a binding contract to perform the duties of the office for the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent.

"The ruling in that case was reaffirmed in Kehn v. State, 93 N. Y. 291, 294, which involved the claim of a fireman whose compensation had been reduced by his superior office below that fixed by law. The court, speaking by Judge Rapallo, reaffirmed the principles of the Satterlee Case, and approved the decision in Goldsborough v. United States, Taney Dec. 80, 88, Fed. Cas. No. 5,519, saying: 'The present case, however, is stronger than either of those cited. At the time the appellant entered into the service his pay was fixed by law, and there is no evidence that he ever consented to a change. It was reduced by the superintendent, and for a portion of the time the appellant took the reduced pay, but that does not estop him from claiming his full pay if he was legally entitled to it.'

"In the Goldsborough Case referred to, Chief Justice Taney said: 'Where an Act of Congress declares that an officer of the Government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress.'

"In Adams v. The United States, 20 Ct. Cls. 115, which involved the compensation due to one who had performed the duties of an inspector and also of deputy collector of customs, the court said: 'The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector

and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it.' In the same case it was also said: 'Monthly vouchers were drawn up, reciting the number of days the claimant was employed during the month and the amount of compensation allowed by the collector and Secretary, ending with a receipt *in full for compensation for the period above stated*, which the claimant signed. We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant lost nothing by signing it. Fisher's Case, 15 Ct. Cl. 323; United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65.'

"Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed, but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by *spelling out a waiver or estoppel*. If it were held otherwise, the result would be that the heads of executive departments could provide in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective po-

sitions for such compensation as the head of a department, under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the executive department of the Government. Public policy forbids the recognition of any such power as belonging to the head of an executive department. The distribution of officers upon such a basis suggests evils in the administration of public affairs which it cannot be supposed Congress intended to produce by its legislation. Congress may control the whole subject of salaries for public officers; and the mere failure of the appointee to demand his salary as such officer until after he had ceased to be local inspector, was not in law a waiver of his right to the compensation fixed by the statute.

"The judgment of the Court of Claims is reversed and the cause is remanded for further proceedings consistent with this opinion."

The record in this case shows that a large number of deserving employees have been deprived for a period of over ten years of the money to which they were entitled, and for the payment of which specific provision has been made by Congress.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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